

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

POC USA, LLC,

Plaintiff,

v.

EXPEDITORS INTERNATIONAL OF
WASHINGTON, INC.,

Defendant.

Case No. C23-1816-RSM

ORDER DENYING IN PART AND
GRANTING IN PART
DEFENDANT’S MOTION TO
DISMISS

I. INTRODUCTION

This matter comes before the Court on Defendant Expeditors International of Washington, Inc. (“Defendant”)’s Motion to Dismiss for Failure to State a Claim, Dkt. #14. Plaintiff POC USA, LLC (“Plaintiff”) opposes the Motion. Dkt. #20. For the reasons set forth below, the Court DENIES IN PART and GRANTS IN PART Defendant’s Motion to Dismiss.

II. BACKGROUND

The Court adopts the following facts from Plaintiff’s Complaint, Dkt. #1.

Defendant Expeditors “is one of the world’s largest Third Party Logistics (“3PL”) service providers[.]” In March 2016, Plaintiff entered into a Distributor Services Agreement (“DSA”) with Defendant, outlining that Defendant would receive shipments of products manufactured by

1 Plaintiff, warehouse the products, and ship the products to Plaintiff's customers. Defendant
 2 would perform these duties using its own computerized distribution management system, and
 3 Defendant was required to provide real-time visibility to Plaintiff of its products.

4 As part of Defendant's service, Defendant highlighted its included Global Security Team,
 5 which "manage[s] Expeditors' systems, processes, and service providers with a consistent
 6 approach that enables Expeditors to move cargo within Expeditors' network securely."
 7 Defendant's IT infrastructure and software was chosen and provided by Defendant.

8 In February 2022, Defendant suffered a cyberattack. Instead of paying a ransom,
 9 Defendant shut down most of its operating systems. Defendant did not provide services to
 10 Plaintiff for almost 90 days. Due to Plaintiff's business involving selling and shipping seasonal
 11 sporting goods, Plaintiff claims economic loss from failure to deliver products for those 90 days
 12 plus the loss of customers to other seasonal sporting goods providers.

13 III. DISCUSSION

14 A. Legal Standard

15 Rule 12(b)(6) allows for dismissal of a complaint due to a plaintiff's "failure to state a
 16 claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal may "be based on
 17 the lack of cognizable legal theory or the absence of sufficient facts alleged under a cognizable
 18 legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). The
 19 complaint must "contain factual matter, accepted as true, to 'state a claim to relief that is plausible
 20 on its face[,] requiring more than "an unadorned, the defendant-unlawfully-harmed-me
 21 accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,
 22 550 U.S. 544, 570 (2007)).

23 When considering a 12(b)(6) motion, the court takes well-pleaded factual allegations as
 24 true and views them in a light most favorable to the plaintiff. *See Wyler Summit P'ship v. Turner*

1 *Broad. Sys., Inc.*, 125 F.3d 658, 661 (9th Cir. 1998). The court does not have to take presented
 2 legal conclusions as factual allegations or accept as true “allegations that are merely conclusory,
 3 unwarranted deductions of fact, or unreasonable inferences[.]” *See Iqbal*, 556 U.S. at 678;
 4 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “Dismissal without
 5 prejudice and without leave to amend is not appropriate unless it is clear . . . that the complaint
 6 could not be saved by amendment.” *Creech v. Tewalt*, 84 F.4 777, 789 (9th Cir. 2023) (quoting
 7 *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)).

8 **B. Analysis**

9 Defendant does not challenge Plaintiff’s claim for breach of contract but argues that
 10 Plaintiff’s other claims for breach of implied duty of good faith and fair dealing, negligence,
 11 gross negligence, unjust enrichment, and violations of the Washington Consumer Protection Act
 12 (“WCPA”) should be dismissed. *See gen. Dkt. #14*. The Court analyzes these claims in turn
 13 below.

14 **a. Implied Duty of Good Faith and Fair Dealing**

15 Under Washington law, “[t]here is in every contract an implied duty of good faith and
 16 fair dealing” that “obligates the parties to cooperate with each other so that each may obtain the
 17 full benefit of performance.” *Rekhter v. Dep’t of Soc. & Health Servs.*, 180 Wn.2d 102, 112, 323
 18 P.3d 1036 (2014) (quoting *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)).
 19 The implied covenant of good faith and fair dealing “cannot add or contradict express contract
 20 terms and does not impose a free-floating obligation of good faith on the parties.” *Id.* at 113.
 21 Instead, “the duty arises only in connection with terms agreed to by the parties.” *Id.* (citations
 22 omitted). The duty can arise “when the contract gives one party discretionary authority to
 23 determine a contract term.” *Id.* (quoting *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*,
 24 86 Wn. App. 732, 738, 935 P.2d 628 (1997)).

1 Defendant argues that Plaintiff cannot bring this claim because Plaintiff “fails to, and
 2 cannot, identify a contractual provision obligating Expeditors to prevent and withstand and/or
 3 mitigate the impact of a cyber-attack on its services[.]” Dkt. #14 at 10. Plaintiff contends that
 4 Defendant breached this implied duty by failing to implement standard industry practices and
 5 available cyber protections and an adequate business continuity plan to protect itself and
 6 customers from cyber-attacks and their effects. Dkts. #1 at ¶¶ 9, 18-20, 24-31, 58; #20 at 5-9.

7 The Court finds Plaintiff has sufficiently alleged that Defendant breached its implied duty
 8 of good faith and fair dealing. Defendant attempts to circumvent this by saying there is no
 9 specific contractual provision obligating it to protect Plaintiff from cyber-attacks but only to
 10 upkeep shipment management services. Dkt. #14 at 9. This is obtuse. Defendant chose and
 11 operated the computer systems the ransomware breached. Defendant presented itself as having
 12 competent security and networks for Plaintiff to rely on. Due to Defendant’s computer systems
 13 allegedly being vulnerable to a cyber-attack and Defendant’s subsequent shutdown, Plaintiff
 14 alleges economic harm from Defendant’s lacking security. Drawing all inferences in Plaintiff’s
 15 favor at this stage, the Court finds Plaintiffs have sufficiently alleged that Defendant breached its
 16 implied duty of good faith and fair dealing to upkeep a safe, reliable, and working software
 17 system.

18 **b. Negligence and Gross Negligence**

19 Defendant argues that Plaintiff’s negligence and gross negligence claims fail because the
 20 parties have no special relationship, there are no allegations of misfeasance, and Defendant owed
 21 no duty to pay the ransom demand. Dkt. #14 at 12-16. Thus, Defendant argues that it cannot be
 22 held liable for the criminal acts of another. *Id.* at 12.

23 Under Washington law, a claim for negligence must allege “(1) the existence of a duty to
 24 the plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate

1 cause of the injury.” *Degel v. Majestic Mobile Manor*, 129 Wn.2d 43, 914 P. 2d 728, 731(1996).
 2 The existence of duty “is a question of law and depends on mixed considerations of logic,
 3 common sense, justice, policy, and precedent.” *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 35
 4 P.3d 1158, 1164 (2001). “Duty in a negligence action is a threshold question” and “may be
 5 predicated ‘on violation of statute or of common law principles of negligence.’” *Jackson v. City*
 6 *of Seattle*, 158 Wn. App. 647, 244 P.3d 425, 428 (2010) (quoting *Burg v. Shannon & Wilson,*
 7 *Inc.*, 110 Wn. App. 798, 43 P.3d 526, 520 (2002)).

8 Under Washington law, “an actor ordinarily owes no duty to protect an injured party from
 9 harm caused by the criminal acts of third parties.” *Parrilla v. King Cty.*, 138 Wn. App. 427, 157
 10 P.3d 879, 884 (2007). Though the Washington Supreme Court has “not yet found a duty to
 11 protect a third party from the criminal acts of another absent a special relationship[,]” it has
 12 “recognized under Restatement § 302B that a duty to third parties may arise in the limited
 13 circumstances that the actor’s own affirmative act creates a recognizable high degree of risk of
 14 harm.” *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212, 216 (2013).

15 Defendant argues that Plaintiff’s claims fail because “[t]here was no legal cognizable
 16 special relationship” between the parties and no affirmative act of misfeasance by Defendant
 17 occurred. Dkt. #14 at 12, 14-15. Plaintiffs argue that Defendant’s “enhanced duty of care existed
 18 independently of the performance of the DSA contract.” Dkt. #1 at ¶¶ 67, 82.

19 However, as described above, Plaintiff argues that Defendant’s failure to implement
 20 effective security was an implied breach of the contract. Plaintiff’s argument of an independent
 21 duty of care appears to be the same argument of Defendant owing Plaintiff under the contract to
 22 provide an effective, safe security system through the computer software Defendant chose and
 23 operated. Furthermore, “the failure to implement adequate data security measures does not
 24 implicate a legal duty on its own.” *Buckley v. Santander Consumer USA, Inc.*, 2018 WL

1 1532671, at *5 (W.D. Wash. Mar. 29, 2018). The Court finds that Plaintiff's negligence
 2 arguments appear duplicative of Plaintiff's contractual arguments. Furthermore, the Court finds
 3 no misfeasance occurred to create an enhanced duty of care because Plaintiff's allegations are, at
 4 most, allegations of omissions or nonfeasance, which Defendant can only be held liable for if a
 5 special relationship exists. *See Veridian Credit Union v. Eddie Bauer, LLC*, 295 F.Supp.3d 1140,
 6 1157-58 (W.D. Wash. 2017); *Guy v. Convergent Outsourcing, Inc.*, 2023 WL 4637318, at *3
 7 (W.D. Wash. 2023). The Court finds that no special relationship existed beyond a normal duty
 8 of reasonable care. Therefore, the Court dismisses Plaintiff's negligence and gross negligence
 9 claims.

10 **c. Bailment**

11 Under Washington law, bailment "arises generally when personalty is delivered to
 12 another for some particular purpose with an express or implied contract to redeliver when the
 13 purpose has been fulfilled." *Eifler v. Shurgard Capital Mgmt. Corp.*, 71 Wn. App. 684, 689
 14 (1993) (internal quotations omitted). For a bailment of personal property to arise, "there must be
 15 a change of possession and an assumption or acceptance of possession by the person claimed to
 16 be a bailee." *Collins v. Boeing Co.*, 4 Wn. App. 705, 711 (1971). An ordinary duty of care is
 17 owed unless heightened under the contract. *See St. Paul Fire & Marine Ins. Co. v. Charles H.*
 18 *Lilly Co.*, 48 Wash. 2d 528, 536 (1956). Parties to a mutually beneficial bailment can contract
 19 to limit negligence, but "[i]t is well settled in Washington that professional bailees may not limit
 20 their liability for negligence." *Am. Nursery Products, Inc., v. Indian Wells Orchards*, 115 Wn.2d
 21 217, 232 (1990). A professional bailee is someone "who deal[s] with the public on a uniform
 22 rather than on an individual basis, including primarily owners of parcel checkrooms, owners of
 23 parking places, garagemen, and warehousemen." *Id.* at 231.

1 Plaintiff asserts that “Expeditors is a professional bailee” who engaged in an “unfair
2 and/or deceptive practice . . . to limit its liability under the DSA . . . when it knew and should
3 have known it is a professional bailee . . . prohibited as a matter of public policy from limiting
4 their liability.” Dkt. #1 at ¶¶ 92, 93, 96, 115-16. Defendant argues that it is not a professional
5 bailee because the services offered to Plaintiff were particularized and the alleged bailment was
6 incident to the performance of services for which Defendant received compensation. Dkt. #14
7 at 18.

8 According to the DSA, “Expeditors offers distribution services” and “agree[d] to provide
9 customized distribution services” to Plaintiff. Dkt. #1-1. Defendant’s services to Plaintiff, per
10 the contract, appear to be particularized and not those of a professional bailee. *Id.* Plaintiff also
11 states in its Complaint that Defendant’s obligations to Plaintiff “were special and unique[.]” Dkt.
12 #1 at ¶ 23. Furthermore, at least one other court found in a different instance that Defendant was
13 not a bailee, leading this Court to construe Defendant not as an entity presenting itself to the
14 public as a professional bailee. *See Certain Underwriters at Lloyd’s v. Expeditors Int’l of*
15 *Washington, Inc.*, 584 F. Supp. 3d 860, 874 (C.D. Cal. 2022). The Court concludes that
16 Defendant is not a professional bailee.

17 The Court also concludes that Plaintiff’s bailment claim is duplicative of other claims.
18 Any bailee/bailor relationship between the parties was created by the DSA. Though Plaintiff
19 argues that the DSA does not address the situation at hand, *i.e.*, what happens when Defendant
20 fails to protect it against the impacts of cyberattacks, Plaintiff argues that this protection is part
21 of the DSA through Defendant’s providing of the software and security systems. *See gen.* Dkt.1;
22 Dkt. #20 at 20-23. If not contractual, Plaintiff argues for unjust enrichment in the alternative.
23 Dkt. #1 at ¶ 104-12. The terms of the DSA govern the bailment duties here over the common-
24 law bailment duties and principles. *See Pollok v. Vanguard Grp, Inc.*, 774 Fed. App’x 407, 408

(9th Cir. 2019) (citing Dan b. Dobbs, et al., *The Law of Torts* § 68 (2d ed. 2019)). Defendant owed a normal duty of reasonable care under the contract as the bailee, and Defendant's alleged breach to provide sufficient services in the wake of cyberattacks is duplicative of other claims. The Court concludes that Defendant is not a professional bailee, and Plaintiff's bailment claim should be dismissed.

d. WCPA

Defendant moves to dismiss Plaintiff's claims under the WCPA because they are based on Defendant's "deceptive" practices as a professional bailee, which Defendant is not. Dkt. #14 at 23. The Court agrees that Plaintiff's claims based on Defendant's alleged deceptive practice of attempting to unlawfully limit its liability as a professional bailee fail. However, the Court finds that Plaintiff has sufficiently alleged WCPA violations to survive Defendant's Motion. *See* Dkts. #1 at ¶¶ 113-24, #20 at 26.

For a private WCPA action, "a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). "Furthermore, as a more general matter, federal courts applying Washington law have consistently found that a 'failure to employ adequate data security measures' that 'result in harm to thousands of customers' is sufficient to constitute an 'unfair' act under the WCPA." *In re Accellion, Inc. Data Breach Litigation*, 2024 WL333893, at *18 (N.D. Cal. Jan. 29, 2024) (citing *Veridian*, 295 F. Supp. 3d at 1162 (W.D. Wash. 2017), *Krefting v. Kaye-Smith Enterprises Inc.*, 2023 WL 4846850, at *8 (W.D. Wash. July 28, 2023), *Guy v. Convergent Outsourcing, Inc.*, 2023 WL 4637318, at *8 (W.D. Wash. July 20, 2023), and *Buckley*, 2018 WL 1532671, at *4 (W.D. Wash. Mar. 29, 2018)). Given this consistent interpretation, construing all interpretations in Plaintiff's favor at this stage,

1 the Court finds that Plaintiff has sufficiently alleged an “unfair” act by Defendant’s failure to
 2 upkeep adequate software and security systems to safeguard Plaintiff’s business operations.

3 **e. Unjust Enrichment**

4 The Court also concludes that Plaintiff sufficiently alleges a claim for unjust enrichment.
 5 As both parties agree, unjust enrichment exists as a remedy when no contract exists but a quasi-
 6 contract implied in law “arises from an implied duty of the parties not based on a contract, or on
 7 any consent or agreement.” *Heaton v. Imus*, 93 Wn.2d 249, 252 (1980); Dkts. #14 at 21, #20 at
 8 23. “Unjust enrichment is the method of recovery for the value of the benefit retained absent any
 9 contractual relationship because notions of fairness and justice require it.” *Young v. Young*, 164
 10 Wn.2d 477, 484 (2008). To establish a claim for unjust enrichment, a plaintiff must show that:
 11 (1) a benefit was conferred on the defendant; (2) the defendant had knowledge or appreciation of
 12 the benefit; and (3) the defendant’s retainment of the benefit without payment of its value is
 13 inequitable under the circumstances. *Id.* at 484-85.

14 Plaintiff argues that its claim for unjust enrichment is plausible “because nothing in the
 15 contract expressly addresses what happens in the event of a cyberattack.” Dkt. #20 at 24.
 16 Defendant argues that “[i]t is undisputed that [the parties’] relationship is governed by an express
 17 contract.” Dkt. #14 at 22. However, Defendant also argues that no contractual provision under
 18 the DSA existed to prevent or protect Plaintiff from cyberattacks. Dkt. #14 at 9-11. Therefore,
 19 “there is a fundamental dispute between the parties concerning the scope of that contractual
 20 relationship and whether it definitively defines [Defendant’s] obligation with respect to
 21 protecting Plaintiff[.]” *In re Cap. One Consumer Data Sec. Breach Litig.*, 488 F. Supp. 3d 374,
 22 412 (E.D. Va. 2020) (considering claims under Washington law). While the Court is skeptical
 23 that the value of Defendant’s benefit is measured by the cost of the avoided ransom, the Court
 24 finds plausible that the benefit conferred was the costs charged by Defendant for Plaintiff’s

1 business during the time of the shutdown. See Dkt. #1 at ¶ 108. The Court concludes that, as an
2 alternative to its express breach of contract claim, Plaintiff has plausibly alleged that if its
3 “express contractual relationship does not govern [Plaintiff’s] rights with respect to the
4 protection” from cyberattacks and secure software, Plaintiff has a claim for unjust enrichment.
5 *Id.*

6 CONCLUSION

7 Having reviewed the relevant briefing and the remainder of the record, the Court hereby
8 finds and ORDERS that Defendant Expeditors’ Motion to Dismiss for Failure to State a Claim,
9 Dkt. #14, is DENIED IN PART and GRANTED IN PART. Plaintiff’s claims for breach of
10 contract, breach of implied covenant of good faith and fair dealing, Washington Consumer
11 Protection Act violations, and unjust enrichment STAND. All other claims (for negligence, gross
12 negligence, and bailment) are DISMISSED.

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14 DATED this 11th day of April, 2024.

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17 RICARDO S. MARTINEZ
18 UNITED STATES DISTRICT JUDGE
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